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The Criminalization of Belief: When Free Exercise Isn't

by
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In November 1988 the California Supreme Court upheld the prosecution of Laurie Walker for the death of her four-year-old daughter Shauntay based on allegations that she was criminally negligent in caring for the child.[1] During her daughter's seventeen-day illness, later diagnosed as meningitis, Walker did not seek conventional medical care, but rather treated her daughter solely with prayer.[2] Following the tenets of her religion, the Church of Christ, Scientist (Christian Science Church),[3] Walker called upon a Christian Science practitioner and a Christian Science nurse to pray for and attend her daughter.[4]

Walker was charged with felony child endangerment[5] and

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1. Walker v. Superior Court, 47 Cal. 3d 112, 118-19, 763 P.2d 852, 855, 253 Cal. Rptr. 1, 4 (1988), *cert. denied,* 491 U.S. 905 (1989).

2. *Id.* at 114, 763 P.2d at 855, 253 Cal. Rptr. at 4.

3. *Id.* at 119 n.1, 763 P.2d at 855 n.1, 253 Cal. Rptr. at 4 n.1. Members of the Christian Science Church reject the concept of human illness, believing that diseases do not exist but instead are errors of the mind. They shun traditional medical treatment and use prayer as a means of seeking the "divine truth" that will cure the mind's error. *See* Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children,* 12 J. LEGIS. 243, 243 n.3 (1985) (authored by Wayne F. Malecha) [hereinafter Note, *Faith Healing Exemptions*]; Note, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer,* 8 LOY. L.A.L. REV. 396, 397 n.7 (1975) (authored by Catherine W. Laughran) [hereinafter Note, *Religious Beliefs*].

4. *Walker,* 47 Cal. 3d at 119 n.1, 763 P.2d at 855 n.1, 253 Cal. Rptr. at 4 n.1. The court explained that "[Christian Science practitioners are] individuals who devote their full time to healing through prayer, or spiritual treatment. . . . Christian Scientists may also call upon the services of a Christian Science nurse, who provides such practical care as dressing of wounds for those having spiritual treatment." *Id.* at 119 n.2, 763 P.2d at 855 n.2, 253 Cal. Rptr. at 4 n.2 (quoting amicus curiae brief of the Christian Science Church). For a brief description of the events leading up to the child's death, see Note, *California's Prayer Healing Dilemma,* 14 HASTINGS CONST. L.Q. 395, 395 (1987) (authored by JoAnna A. Gekas) [hereinafter Note, *California's Prayer Healing*], and Note, Walker v. Superior Court: *Religious Convictions May Bring Felony Convictions,* 21 PAC. L.J. 1069, 1083 (1990).

5. CAL. PENAL CODE § 273a(1) (West 1988). The statute provides in relevant part:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.

Id.

involuntary manslaughter[6] for failing to seek medical care during her child's fatal illness.[7] The court rejected her contention that the exemption for spiritual treatment[8] found in section 270 of the California Penal Code,[9] a misdemeanor child protection statute, provided an absolute defense to any prosecution for criminal neglect, whether under section 270 or the felony laws under which Walker was charged.[10] The court further rejected Walker's defense that her conduct was absolutely protected from liability under the first amendment free exercise clause.[11]

The *Walker* majority failed to announce a rational and consistent law that will at once protect innocent children from neglect and preserve the freedoms of conscience guaranteed to their parents by the first amendment. The court admitted that spiritual treatment under section 270 "represent[s] an alternative to medical attendance under the terms of . . . [that section],"[12] concluding "that section 270 exempts parents who utilize prayer treatment from the statutory requirement to furnish medical care."[13] The majority refused, however,

6. CAL. PENAL CODE § 192 (West 1988). The statute provides in relevant part:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
>
> . . . .
>
> (b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection . . . .

Id.

7. *Walker,* 47 Cal. 3d at 118-19, 763 P.2d at 855-56, 253 Cal. Rptr. at 4-5.

8. For the purposes of this Note, "spiritual treatment" and "faith healing" are used interchangeably to describe the use of prayer, faith, or other spiritual means to treat illness in lieu of the more common reliance on orthodox methods of medical science.

9. The statute provides in relevant part:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, *or other remedial care* for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. . . . *If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care", as used in this section.*

CAL. PENAL CODE § 270 (West 1988) (emphasis added).

10. *Walker,* 47 Cal. 3d at 129, 763 P.2d at 862-63, 253 Cal. Rptr. at 11-12.

11. *Id.* at 141, 763 P.2d at 871, 253 Cal. Rptr. at 20. For a discussion of the *Walker* court's treatment of Laurie Walker's free exercise claims, see *infra* Parts II.B.-C.

12. *Walker,* 47 Cal. 3d at 122, 763 P.2d at 857, 253 Cal. Rptr. at 6.

13. *Id.* at 123, 763 P.2d at 858, 253 Cal. Rptr. at 7. The *Walker* court did not decide and this Note does not address the question of whether § 270 violates the establishment clause of the first amendment or the California Constitution. An argument can be made that § 270 does violate the establishment clause *See id.* at 148, 763 P.2d at 876, 253 Cal. Rptr. at 25

to extend the statutory defense to prosecutions for felony child endangerment and involuntary manslaughter.[14] The result protects parents who seek spiritual treatment for their children as long as the children are not truly sick; otherwise, these parents had better hope their god is listening. Unlike parents who choose orthodox medical care for their children, parents who rely on spiritual treatment for their sick children now face potential criminal liability if the child is not cured.

In rejecting Walker's first amendment claims, the court relied on the United States Supreme Court's distinction between religious *beliefs,* which are absolutely protected under the first amendment, and religiously motivated *conduct,* which receives only qualified protection.[15] Citing this distinction, the court divorced Walker's beliefs from her conduct of providing spiritual care in lieu of orthodox medical treatment for her daughter.[16] After stating simply that courts evaluate criminal negligence with reference to objective standards of reasonableness, the *Walker* court turned to the only remaining question: Whether a reasonable person in the defendant's position would have acted as the defendant did.[17]

Such an approach, however, fails to recognize the unique character of free exercise protections and ultimately sanctions the individual for her belief.[18] To the extent an objective standard of criminal negligence requires the trier of fact to examine the faith healing par-

(Mosk, J., concurring); Note, *California's Prayer Healing, supra* note 4, at 412-14. *Cf.* Note, *When Rights Clash: The Conflict Between A Parent's Right to Free Exercise of Religion Versus His Child's Right to Life,* 19 CUMB. L. REV. 585, 596-97 (1989) (authored by John T. Gathings, Jr.) [hereinafter Note, *When Rights Clash*] (discussing State v. Miskimens, 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (1984), which held a similar statutory exemption violative of the establishment clause); Note, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death—Involuntary Manslaughter in Pennsylvania,* 90 DICK. L. REV. 861, 887-88 (1986) (authored by Daniel J. Kearney) [hereinafter Note, *Parental Failure*] (generally discussing difficulties with the establishment clause and religious exemptions).

Regarding the Supreme Court's establishment clause decisions, one commentator has lamented, "The Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision,* 67 TEX. L. REV. 955, 956 n.1 (1989) (quoting L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986)).

14. *Walker,* 47 Cal. 3d at 151, 763 P.2d at 878, 253 Cal. Rptr. at 27 (Broussard, J., dissenting in part). In his dissent, Justice Broussard argued that § 273a (felony endangerment) applies only to "active conduct endangering the child" and because prayer healing does not constitute "active conduct," he would have extended the section 270 exemption for spiritual treatment to section 273a.

15. For a discussion of the belief-conduct distinction, see infra Part I.A.

16. *Walker,* 47 Cal. 3d at 139, 763 P.2d at 869-70, 253 Cal. Rptr. at 19.

17. *Id.* at 136, 763 P.2d at 868, 253 Cal. Rptr. at 17.

18. At least one commentator has characterized the "belief-action" dichotomy as "at best an oversimplification." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1184 (2d ed. 1988).

ent's knowledge, or to impute to that parent the knowledge of a "reasonable person," it infringes on the parent's absolutely protected religious beliefs. It is not possible to determine the objective reasonableness of Laurie Walker's *conduct* of relying solely on spiritual treatment without determining the reasonableness of her *belief* in the power of prayer as a healer. Such a determination violates the Supreme Court's consistent holding that religious *belief* is absolutely protected under the free exercise clause of the first amendment.[19]

This Note contends that the California Supreme Court should have barred Walker's prosecution for felony child endangerment and involuntary manslaughter. Moreover, this Note argues that prosecutions for criminal negligence based on parents' spiritual treatment of their children that do not consider the defendants' *subjective* belief in the power of prayer to heal violate the first amendment's free exercise clause. Part I discusses the United States Supreme Court's free exercise cases that establish the belief-conduct distinction. This Part also examines the difficulties of satisfactorily defining "religion," the subject of free exercise protection. Without a workable definition of religion, it is impossible to determine which beliefs and actions are protected by the free exercise clause. Part II uses *Walker v. Superior Court* to analyze religiously motivated treatment cases in an attempt to find a consistent application of the United States Supreme Court's free exercise doctrines to the spiritual treatment of ill children. Particular attention is given to California's objective standard for criminal negligence. Part III discusses the incompatibility of that objective standard with first amendment free exercise rights. This Part concludes that the rhetorical belief-conduct distinction, as applied in *Walker,* is hollow protection and ultimately leaves free exercise protections vulnerable to restriction by the state at all levels.

I. Background on First Amendment Religious Freedoms

The first amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[20] Though the amendment was

19. *See, e.g.,* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

20. U.S. CONST. amend. I. The California Constitution provides similar protection for the free exercise of religion. It states in relevant part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.

CAL. CONST. art. I, § 4. *See generally* Note, *California's Prayer Healing, supra* note 4, at 409 (discussing independent state grounds for free exercise claims in California).

written in absolute terms—"Congress *shall make no law*"—United States Supreme Court decisions have limited the amendment's protections. In fact, without limitations the two proscriptions—the first against laws establishing religion and the second against laws prohibiting the free exercise of religion—would come into direct conflict.[21] To the extent that the state must recognize the religious nature of a belief or practice in order to avoid infringing upon it, one could argue that the state is accommodating that belief or practice in an unconstitutional establishment of religion. Thus, pure nonestablishment might be complete neutrality, and neutrality necessarily would be indifferent to restrictions on the exercise of religion.[22]

The contours of first amendment free exercise protection can be outlined by several key decisions of the United States Supreme Court spanning more than 100 years. While the Court appeared to be moving in the direction of heightening religious protections, several recent cases have stunted movement in that direction. In fact, the Court appears to have limited severely the freedoms afforded by the free exercise clause. The limits that the Court has established for free exercise will determine the extent to which parents are allowed to choose spiritual treatment for their ill children in lieu of orthodox medical care.

A. Free Exercise Under the First Amendment

(1) Development of the Sherbert *Compelling Interest Standard*

In 1878 the United States Supreme Court for the first time recognized the belief-conduct distinction relating to first amendment protection. In *Reynolds v. United States,*[23] the Court refused to recognize a religious defense to a bigamy conviction.[24] In interpreting the first amendment, the Court stated, "Congress was deprived of all legislative power over mere *opinion,* but was left free to reach *actions* which [are] in violation of social duties or subversive of good order."[25] The

21. *See* L. TRIBE, *supra* note 18, at 1157; Smith, *supra* note 13, at 990-93.

22. L. TRIBE, *supra* note 18, at 1167-68; *but cf.* Sherbert v. Verner, 374 U.S. 398, 409 (1963) ("the governmental obligation of neutrality in the face of religious differences . . . does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.").

23. 98 U.S. 145 (1878).

24. When *Reynolds* was decided, the Church of Jesus Christ of Latter-Day Saints (the Mormon Church) accepted the doctrine that male members of the church had a duty to practice polygamy. *Id.* at 161. "Bigamy" involves an illegal second marriage. "Polygamy" is the offense of having several marriages, or more than one spouse, at the same time. BLACK'S LAW DICTIONARY 1159 (6th ed. 1990).

25. *Reynolds,* 98 U.S. at 164 (emphasis added).

Court found that a law regulating so fundamental a part of society as marriage was not prohibited by the Constitution, and that permitting an individual to violate that law because of professed religious beliefs would "permit every citizen to become a law unto himself."[26] Relying on evidence of western traditions viewing polygamy with disfavor and a history of antibigamy laws,[27] the *Reynolds* Court rejected the argument that polygamy was a protected religious belief that could justify "an overt act made criminal by the law of the land."[28] *Reynolds* thus distinguished an absolutely protected religious belief from wholly unprotected practices motivated by that belief.[29]

Sixty-two years later in *Cantwell v. Connecticut*,[30] the Supreme Court held that first amendment protections apply to the states through the due process clause of the fourteenth amendment and reaffirmed the *Reynolds* distinction between the freedom to believe and the freedom to act: "The first is absolute but, in the nature of things, the second cannot be."[31] The Court established, however, that in regulating religious conduct, the state must not unduly burden that religious belief.[32] *Cantwell* involved Jehovah's Witnesses who were convicted for soliciting religious contributions without approval from local authorities as required by a state statute.[33] The Court found that the statute as applied to the defendants violated the free exercise clause because the right to solicit was conditioned upon a state officer's determination that the cause was religious.[34] While the Court held that the state was free to protect its citizens from fraudulent solicitations[35] and to regulate solicitation generally "in the interest of public safety, peace, comfort or convenience,"[36] it concluded that conditioning the defendants' solicitation on the state officer's finding of a religious cause was too burdensome on the defendants' free exercise of religion. Thus, *Cantwell* limited the state's power to regulate religiously motivated conduct: that power "must be so exercised as not . . . unduly to infringe the protected freedom."[37]

26. *Id.* at 167.
27. *Id.* at 164-66.
28. *Id.* at 162.
29. *Id.* at 166; *see also* Davis v. Beason, 133 U.S. 333 (1890) (upholding an Idaho antibigamy statute against a free exercise defense).
30. 310 U.S. 296 (1940).
31. *Id.* at 303-04.
32. *Id.* at 304.
33. *Id.* at 301-02.
34. *Id.* at 305.
35. *Id.* at 306.
36. *Id.* at 307.
37. *Id.* at 304; *see also* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (holding that

The Court further protected the *practice* of religious beliefs in *Sherbert v. Verner,*[38] holding that only a compelling state interest can justify substantially burdening an individual's free exercise rights.[39] In *Sherbert,* a member of the Seventh-Day Adventist Church was denied state unemployment benefits after she was discharged for refusing to work on Saturday.[40] She challenged the denial of benefits as an impermissible violation of her first amendment rights. Finding that the denial of unemployment benefits did impose a substantial burden on the appellant's exercise of religion,[41] the Court next questioned whether South Carolina had some compelling state interest to justify its denial of benefits.[42] Rejecting the state's suggestion that the possibility of "fraudulent claims by . . . claimants feigning religious objections to Saturday work"[43] justified the burden on the appellant, the Court found no compelling interest to justify the state-imposed burden on the appellant's religious practice.[44] Moreover, even if the threat of fraudulent claims was compelling, the Court stated that "it would plainly be incumbent upon the appellees to demonstrate *that no alternative forms of regulation would combat such abuses* without infringing First Amendment rights."[45] Thus, *Sherbert* solidified the so-called "least restrictive alternative"[46] requirement for state regulation of religious conduct to which the Court had referred in *Cantwell.*[47]

The Court applied the principles of *Sherbert* in *Wisconsin v. Yoder*[48] and found that the state's interest in compulsory education did not outweigh the burden such a regulation would place on the free exercise rights of the Amish.[49] Wisconsin's compulsory school atten-

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the state must utilize the "least restrictive means" available in promoting its compelling interests.)

38. 374 U.S. 398 (1963).

39. *Id.* at 403.

40. Members of the Seventh-Day Adventist Church are prohibited from working on Saturday, their sabbath. *Id.* at 399 & n.1. In *Sherbert,* the state had found the appellant ineligible for state unemployment benefits because she refused to accept employment that required Saturday work. *Id.* at 401.

41. *Id.* at 403.

42. *Id.* at 406.

43. *Id.* at 407.

44. *Id.* at 406-09; *see also* Thomas v. Review Bd., 450 U.S. 707 (1981) (overturning a state's denial of unemployment benefits to a Jehovah's Witness who quit his job because of religious convictions after being transferred to an area that manufactured tank gun turrets).

45. *Sherbert,* 374 U.S. at 407 (emphasis added).

46. *See* L. TRIBE, *supra* note 18, at 1256.

47. *See* Cantwell v. Connecticut, 310 U.S. 296, 306-07, 311 (1940); *supra* notes 30-37 and accompanying text.

48. 406 U.S. 205 (1972).

49. *Id.* at 234-36. As members of the Old Order Amish community, the respondents in

dance law required that the defendants' children continue in public or private school until the age of sixteen. The defendants' children were fourteen and fifteen, and they had completed the eighth grade. The defendants chose not to send their children to school for the one or two years that remained before the children were beyond the reach of the statute. The defendants were tried and convicted under the state statute.[50] Having stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion,"[51] the Court held that the state's interest in compulsive education did not outweigh the burden on the defendants' free exercise of religion.[52] The Court concluded that the state's interests in the physical and mental health of the children and their ability to become self-supporting were satisfied by the continued vocational education the children would receive at home.[53]

The Supreme Court has maintained two areas, then, for which the first amendment provides differing levels of religious protection: religious beliefs and religious conduct motivated by those beliefs. An individual's religious beliefs, her personal thoughts and convictions, are beyond the reach of state intrusion; but conduct remains within the state's power to regulate, if only upon a showing of compelling state interest, despite its religious nature. The distinction between belief and conduct becomes crucial to the free exercise protection of faith healing parents.[54]

(2) The Coercion Standard: The Other Side of the Coin

In denying several free exercise claims following *Sherbert,* the Supreme Court addressed the claims by asking not whether the state had

Yoder believed that sending their children to public high schools was contrary to their religion and would threaten their children's salvation. *Id.* at 209. The Supreme Court noted that the Amish "view[ed] secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." *Id.* at 211.

50. *Id.* at 207-08.

51. *Id.* at 215; *see* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (stating that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (recognizing that a parent's conflict with the state over control of her child and the child's training involved balancing the parent's "sacred private interests" with the societal interest in safeguarding children from abuses).

52. *Yoder,* 406 U.S. at 234-36.

53. *Id.*

54. *See infra* Parts II.B.-C.

"accommodated"[55] the claimant's religious practices, but rather whether the state had "coerced" the claimant into actions violating her religious belief.[56] In taking this approach, the Court has denied any inconsistency with the *Sherbert* compelling interest standard.[57] Even assuming that the Court has followed the *Sherbert* analysis by reframing the question, the Court in effect has reduced the burden required of the state to justify its intrusion.

In *Bowen v. Roy*,[58] the Supreme Court permitted the enforcement of a federal administrative provision, requiring that recipients of Aid to Families with Dependent Children provide social security numbers for all members of their household.[59] Two Native American parents claimed that obtaining a social security number for their daughter would violate their "religious belief that control over one's life is essential to spiritual purity," because once the number was issued, their daughter would not be able to maintain control over the state's use of it.[60] After acknowledging the distinction between the absolute protection of belief and the qualified protection of conduct,[61] the Court concluded that the social security requirement in "a uniformly applicable statute neutral on its face [was] of a wholly different, less intrusive nature than affirmative compulsion" of religious conduct.[62] Thus, because the federal government merely refused to accommodate the parents' religion by exempting them from the requirement, and did not compel or coerce them into violating their religious beliefs, the Court held that the requirement did not violate the first amendment.

In *Lyng v. Northwest Indian Cemetery Protective Association*,[63] the Supreme Court followed *Roy* and refused to enjoin construction of a logging road through federal land that would have intruded upon an area of wilderness held sacred by several Native American tribes. The Court drew a parallel between the Indians' claims to the sacred land and the *Roy* parents' challenge to the requirement that they ob-

55. Use of the term "accommodation" refers merely to those instances discussed above when the Court has ordered the state to exempt individuals from certain regulations that burdened their free exercise of religion. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting members of the Old Order Amish from Wisconsin's compulsory school attendance law); *see also* L. TRIBE, *supra* note 18, at 1168 n.12 (describing "practices or policies whereby government steps aside or creates an exemption in order to produce free exercise neutrality").

56. *See Supreme Court—Leading Cases*, 102 HARV. L. REV. 143, 233, 236 (1988).

57. *See* Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

58. *Id.* at 693.

59. *Id.* at 698.

60. *Id.* at 696.

61. *Id.* at 699.

62. *Id.* at 704.

63. 485 U.S. 439 (1988).

tain a social security number for their daughter.[64] As in *Roy,* the Court in *Lyng* refused to find a free exercise protection that would allow the claimants effectively to control the federal government's "internal affairs."[65] The Court explained, "In neither case . . . would the affected individuals be *coerced* by the Government's action into violating their religious beliefs."[66] The decision in *Lyng* is significant because the Court did not claim to be departing from established precedent.[67] Instead, by focusing on the coercion standard in *Roy,* the *Lyng* majority avoided the *Sherbert* compelling interest standard. The Court explained that the *Sherbert* decision "[did] not and cannot imply that incidental effects of government programs, . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[68] Quoting from Justice Douglas's concurring opinion in *Sherbert,* the Court described the applicable coercion standard: "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[69] By thus reframing the issue, the Court feigned consistency with its free exercise precedent. Nonetheless, this artificial bright line between state coercion and state non-interference has left unpopular religious beliefs vulnerable to not-so-neutral statutes of general applicability. One properly might ask: had the belief in the power of social security numbers to rob one of one's spirit been a mainstream religious belief, would the court not have come out on the "impermissible state intrusion" side of free exercise analysis and granted the belief first amendment protection, if only by requiring a showing of compelling government interest?

(3) The Demise of Sherbert

In 1990, the Supreme Court decided the fate of the *Sherbert* compelling interest standard in *Employment Division v. Smith.*[70] While

64. *Id.* at 448-49.

65. *Id.*

66. *Id.* at 449 (emphasis added). *But see* Note, *Pursuing Native American Rights in International Venues: A* Jus Cogens *Strategy After* Lyng v. Northwest Indian Cemetery Protective Association, 42 HASTINGS L.J. 591 (1991) (authored by Christopher P. Cline) (arguing that the Supreme Court's decision amounted to a violation of international human rights because it effectively would have destroyed a religion).

67. *Lyng,* 485 U.S. at 450-51, 456-57.

68. *Id.* at 450-51.

69. *Id.* at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). It should be noted that the *Roy* Court also quoted Justice Douglas. Bowen v. Roy, 476 U.S. 693, 700 (1986).

70. 110 S. Ct. 1595 (1990).

continuing to disclaim any departure from the *Sherbert* free exercise protections,[71] the *Smith* Court substantially modified the nature of first amendment protection afforded to religiously motivated conduct.

Smith involved two members of the Native American Church who were fired from their jobs with a private drug rehabilitation organization when their employer learned that they had ingested peyote as part of a religious ceremony.[72] The Oregon Employment Division denied their applications for unemployment benefits because they had been fired for work-related "misconduct."[73] The respondents claimed that this denial violated their free exercise rights under the United States Constitution.

In addressing the respondents' religious claims, the United States Supreme Court ultimately focused on the legality of the respondents' peyote use. Because the Oregon Supreme Court determined that the respondents' actions were criminal under state law, the United States Supreme Court concluded that the denial of benefits did not violate their free exercise rights.[74] The *Smith* Court held that the first amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[75]

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71. The *Smith* Court reaffirmed the distinction between the absolute protection given religious beliefs and the qualified protection given belief-motivated conduct: "[T]he First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" *Id.* at 1599 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

72. *Id.* at 1596. Respondents used peyote as a religious sacrament in a ceremony of the Native American Church. Peyote is an hallucinogen that grows in small buds on the *Lophophora williamsii,* a small, spineless cactus. It plays a central role in the Church's ceremonies and practices. Church theology combines Christianity with a belief that the plant embodies the Holy Spirit and that those who take the drug come into direct contact with God. People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 816-17, 40 Cal. Rptr. 69, 72-73 (1964).

73. *Smith,* 110 S. Ct. at 1596. The Oregon Court of Appeals reversed the state agency's holding on the grounds that it violated the respondents' free exercise rights under the United States Constitution. *Id.* The Oregon Supreme Court rejected the state's claim that the agency's holding did not violate the first amendment because peyote use was prohibited by state criminal law. *Id.* The state supreme court found the illegality of the respondents' actions irrelevant because the "misconduct" standard applied by the state agency was not intended to enforce state criminal laws. *Id.* At this point the case history becomes complicated. On its first appearance before the United States Supreme Court, *Smith* was remanded for a state court determination of the criminality of respondents' religiously motivated peyote use. *Id.* at 1598. 485 U.S. 660, 673 (1988). The Oregon Supreme Court found that the state criminal law provided no exemption for religious use of peyote and, therefore, held that the prohibition violated the first amendment. 307 Or. 68, 763 P.2d 146 (1988). The United States Supreme Court again granted certiorari. 489 U.S. 1077 (1989).

74. *Smith,* 110 S. Ct. at 1606.

75. *Id.* at 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

Although reminiscent of the Court's language in *Sherbert,*[76] Justice Scalia's majority opinion in *Smith* rejects *Sherbert*'s requirement that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[77] Consequently, *Smith* significantly narrows the scope of free exercise protections.

The *Smith* Court justified this holding by first pointing out that the Supreme Court never had struck down governmental actions on the basis of *Sherbert* outside the area of unemployment compensation.[78] Second, the only cases in which the Court previously had found the first amendment to bar application of "a neutral, generally applicable law to religiously motivated action" were those involving other constitutional claims in addition to free exercise.[79] These "hybrid" claims involve, for instance, free exercise and free speech,[80] or free exercise reinforced by the assertion of parental rights.[81] The *Smith* majority explained that courts have given greater protection to religious freedom in these instances than in cases involving an exclusive assertion of the constitutional right to practice religion free from governmental interference. The Court concluded, therefore, that a free exercise claim standing alone, like that of the Native Americans before the Court, did not merit the heightened protection given to "hybrid" claims or the protection of the compelling interest standard given to free exercise claims in the context of unemployment compensation.[82]

Although Justice Scalia denied that the *Smith* decision departed from settled free exercise precedents, the majority all but decimated former first amendment protection of religiously motivated conduct.[83] After *Smith,* the free exercise clause does not prohibit governmental action that has merely the "incidental effect" of burdening religious conduct—no matter how severe the burden.[84] The *Smith* majority explained:

> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by gov-

76. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles").

77. *Smith,* 110 S. Ct. at 1602-06 (quoting *Sherbert,* 374 U.S. at 402-03).

78. *Id.* at 1602.

79. *Id.* at 1601-02.

80. *Id.* at 1601 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

81. *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

82. *Id.* at 1602-03.

83. *See id.* at 1602-06; *cf. id.* at 1607 (O'Connor, J., concurring in the judgment) ("To reach this sweeping result . . . the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine . . . .").

84. *Id.* at 1602-06.

> ernment . . . , the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. . . .
>
> Even if we assume that . . . the [logging] road will 'virtually destroy the . . . Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' [free exercise] claims.[85]

The Court held that the Oregon statute criminalizing peyote use was valid because it applied generally to all persons using peyote, and the statute's burden on members of the Native American Church was only "incidental" to the statute's general reach.[86] Thus, after *Smith*, the first amendment protects religiously motivated conduct only from governmental action that is primarily directed toward the religious nature of the activity.[87]

Following *Smith,* then, it appears that the *Sherbert* standard requiring a compelling interest to justify state interference with an individual's religious conduct has been limited to the unemployment compensation context.[88] The protection that remains for religiously motivated conduct is merely the freedom from state coercion applied in *Lyng v. Northwest Indian Cemetery Protective Association.*[89] The state may not coerce or compel an individual to act in violation of her religious beliefs, but as the *Smith* Court held, an individual cannot avoid the requirements of a neutral and generally applicable law simply because the law has the incidental effect of infringing upon the individual's religious practices.[90]

Significantly, however, the *Smith* majority left open the possibility that parents who choose to treat their children with prayer may have a "hybrid" claim involving free exercise in conjunction with a claim to parental rights that still will merit heightened protection.[91] The burden imposed on the state by this heightened protection is unclear and presumably would be something less than the *Sherbert* compelling interest-least restrictive means standard. And despite the significant limits it placed on the free exercise protections for religiously motivated conduct, the Supreme Court in *Smith* maintained at least the rhetoric of an absolute protection for religious *beliefs.*[92]

85. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 451-52 (1988).

86. *Smith,* 110 S. Ct. at 1602.

87. *Id.* at 1599-1600.

88. *See supra* notes 76-78 and accompanying text.

89. 485 U.S. 439 (1988); *see supra* notes 63-69 and accompanying text.

90. *See supra* text accompanying notes 75, 84.

91. *See supra* text accompanying notes 79-81.

92. *See supra* text accompanying note 78.

B. Defining "Religion"

Once the Court has established a constitutional scheme for protecting the free exercise of religion, the task remains to define the scope of the protection. Because religion involves personal matters of conscience, a precise definition that accounts for all faiths and beliefs is impossible. If everyone subscribed to the same religious beliefs and completely agreed on the interpretation of those common beliefs,[93] first amendment free exercise protection would be unnecessary. Every citizen, every legislator, every jury member, every prosecutor, and every judge would agree on the priority to be given to each belief. The unanimity of religion would protect and preserve those commonly held beliefs and the rights of those who profess them. But this is not the society in which we live.[94] The Supreme Court has said, therefore, that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[95] Against this background, courts strive to resolve the conflict between seemingly absurd notions, offered as religious beliefs, and the first amendment protection afforded to them almost because of their perceived absurdity.

(1) Judicial Approaches to Defining Religion

The inherent difficulties in defining "religion" under the first amendment are illustrated by the Supreme Court's conscientious objector cases. In these cases, the Court has confronted problems in the interpretation of the Universal Military Training and Service Act (Military Service Act),[96] which excuses from military service persons who object based on their religious beliefs. As with cases involving first amendment free exercise claims, the Court has attempted to define the boundaries of the rights afforded by the statute's reference to religious beliefs.

In *United States v. Seeger*,[97] the Court was faced with interpreting a section of the Military Service Act that exempted from combat service military personnel opposed to participation in war because of their religious training and beliefs.[98] That section defined "religious training

93. A recent episode of a popular talk-show demonstrated the fact that even among those of the same faith, there is a significant diversity of interpretations. *Oprah* (syndicated television broadcast, Apr. 10, 1991).

94. *See* N.Y. Times, Apr. 10, 1991, at A-1, col. 1.

95. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

96. 50 U.S.C. § 456(j) (1982).

97. 380 U.S. 163 (1965).

98. *Seeger*, 380 U.S. at 164-65.

and belief" as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[99] The district courts denied the conscientious objectors' claims because they did not present their convictions expressly in relation to some "Supreme Being."[100] One defendant relied on his belief in "goodness and virtue for their own sakes . . . without belief in God, except in the remotest sense."[101] Another claimed that his opposition to war was based on his belief in "the Supreme Reality,"[102] and a third stated simply that his objection was based on a moral code that was superior to any obligation to the state.[103]

Finding that all three qualified for the exemption from military service, the Supreme Court read the Military Service Act's reference to a "Supreme Being" broadly and held that the exception extended to

> all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A *sincere and meaningful belief* which occupies in the life of its possessor a place parallel to that filled by . . . [an orthodox belief in] God.[104]

The Court's logic was circular, defining a "religious belief" as a belief that can be understood by referring to orthodox religious principles. This result is desirable, however, because it recognizes that individuals may articulate their beliefs differently and that courts must determine "whether [those beliefs] are, in . . . [that person's] own scheme of things, religious."[105]

The Court embraced and expanded upon *Seeger*'s reasoning in another conscientious objector case involving the Military Service Act. In *Welsh v. United States,*[106] the Court analyzed whether the professed beliefs "play the role of a religion and function as a religion in the . . . [individual's] life."[107] The Court then extended *Seeger*'s already broad reading of religion. It stated that even the individual's own characterization of his beliefs as "nonreligious" should not necessarily undermine the application of the conscientious objector exception.[108]

99. *Id.* at 173 (quoting 50 U.S.C. § 456(j) (1982)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 216 (1971) (purely secular philosophies not protected).
100. *Seeger,* 380 U.S. at 166-69.
101. *Id.* at 166.
102. *Id.* at 167.
103. *Id.* at 169.
104. *Id.* at 176 (emphasis added).
105. *Id.* at 185.
106. 398 U.S. 333 (1970).
107. *Welsh,* 398 U.S. at 339.
108. *Id.* at 341.

The defendant in *Welsh* initially had characterized his beliefs as non-religious,[109] but the Court was not influenced by this admission. The Court was persuaded that the defendant's beliefs, however characterized, held a place in the life of the defendant parallel to more traditional concepts of religious faith.[110] It is the nature of the belief and the subjective value placed on that belief, then, rather than the label given to it, that are important for purposes of the Military Service Act's religious exception.

Although the conscientious objector cases illustrate how courts approach the problem of defining religion, they involve interpretation of a statute that provides more guidance than the first amendment's mere reference to the free exercise of "religion." As a result of the broad and ambiguous reference to religion in the first amendment, courts have had to face what some consider to be extremely unorthodox claims under the heading of free exercise. In *People v. Woody,*[111] the California Supreme Court held that the use of an illegal hallucinogen by members of the Native American Church was a protected religious practice. In contrast, a federal district court in *United States v. Kuch*[112] rejected similar claims by a member of the Neo-American Church. This purported religious organization was led by a "Chief Boo Hoo" and the official songs of the church were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat."[113] The church motto, printed on various items such as sweat shirts and sacramental pipes, was "Victory over Horseshit!"[114] The *Kuch* court declined to recognize the Neo-American Church as a religion for first amendment purposes, stating, "It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence."[115]

109. Welsh believed "the taking of life—anyone's life—to be morally wrong." *Id.* at 343 (quoting Appellant's brief). In filling out his conscientious objector application, he struck through the word "religious" and later explained that his beliefs were formed "by reading in the fields of history and sociology." *Id.* at 341 (quoting Appellant's Brief).

110. *See id.* at 343; *see also* United States v. Seeger, 380 U.S. 163, 176 (1965) (recognizing that an individual's beliefs may qualify as sincere religious beliefs even though the individual does not subscribe to a traditional religion).

111. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). The California Supreme Court relied on the federal constitution in deciding *Woody*. Thus, following Employment Division v. Smith, the continued authority of *Woody* appears doubtful.

112. 288 F. Supp. 439 (D.D.C. 1968); *see also* Leary v. United States, 383 F.2d 851 (5th Cir. 1967) (upholding Dr. Timothy Leary's conviction for violations of federal criminal statutes relating to the "psychedelic" drug marijuana and rejecting the defendant's free exercise claims), *cert. granted,* 392 U.S. 903 (1968), *rev'd on other grounds,* 395 U.S. 6 (1969).

113. *Kuch,* 288 F. Supp. at 444.

114. *Id.* at 445.

115. *Id.* at 444.

In defining religion to determine if a claim legitimately comes under the free exercise clause, courts ultimately focus on one factor—the sincerity of the individual. If the belief holds a sincere and meaningful place in the individual's life, then courts seem willing to assume that it could be labeled religious.[116] In fact, for a court to inquire beyond the individual's sincerity in addressing a religious claim would potentially violate the Supreme Court's proscription of questioning the correctness of religious beliefs. Thus, as the focus of judicial inquiry, the sincerity of an individual's religious beliefs must be considered without regard to the value placed on those beliefs by others.

(2) Verity of Belief Beyond Judicial Province

Although courts must examine the religious nature of the claimed beliefs and actions when presented with a free exercise claim, they must not evaluate the correctness of the belief or the religion that supports the belief. The United States Supreme Court has recognized that this issue is beyond the courts' authority.[117] The individual has the right to be free of governmental intrusions into his mind: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[118]

In *Thomas v. Review Board,*[119] the Supreme Court stated that the determination of what is or is not a religious belief or practice should not depend on a "*judicial* perception" of the religious claims in question.[120] *Thomas* involved a Jehovah's Witness who was denied state unemployment benefits when he quit his job after being transferred to a department that manufactured gun turrets for military tanks. Thomas objected to participating in the production of war materials on the basis of his religious faith.[121] The Indiana Supreme Court held that although Thomas described his reasons for quitting as religious, the religious basis of his claimed belief was unclear, and therefore, Thomas' decision was not sufficiently "religious" to merit protection under the first amendment.[122] The United States Supreme Court, however, reversed the state court, holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[123]

116. *See supra* notes 104-110 and accompanying text.
117. Stanley v. Georgia, 394 U.S. 557, 564-66 (1969).
118. *Id.* at 565. Presumably, women's minds receive similar protection.
119. 450 U.S. 707 (1981).
120. *Id.* at 714 (emphasis added).
121. *Id.* at 709.
122. *Id.* at 714.
123. *Id.*

Thomas illustrates the Supreme Court's reluctance to debate the efficacy of an individual's faith.[124] While maintaining that only religious beliefs are protected by the free exercise clause,[125] the Court nonetheless stated:

> Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.[126]

The judicial task, then, is to evaluate the sincerity of the claimed religious conviction,[127] not the veracity of the claim nor the claim's consistency with those of other adherents to that particular faith.[128] If the first amendment is to provide genuine protection for an individual's religious beliefs, courts must not intrude into the merits of those beliefs.

The *Thomas* decision is consistent with the Supreme Court's past line of free exercise cases and the distinction drawn between belief and conduct.[129] In *United States v. Ballard,*[130] for example, the Supreme Court recognized the *absolute* nature of the protections afforded to religious beliefs as opposed to the *qualified* protection of religiously motivated conduct. The *Ballard* Court held that in a criminal prosecution for an alleged scheme to defraud based on representations of religious doctrines and beliefs, "all questions concerning the truth or falsity of the [defendants'] religious beliefs or doctrines" were properly withheld from the jury.[131] The only proper question involved the sincerity of the defendants' beliefs. The Court stated, "Men may be-

124. The majority in Employment Division v. Smith, 110 S. Ct. 1595 (1990), chose not to upset this well-established maxim, instead citing it as support for its argument against the viability of requiring a compelling state interest standard. "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the [same] test in the free speech field." *Id.* at 1604.

125. *Thomas,* 450 U.S. at 713.

126. *Id.* at 715.

127. Courts can evaluate whether claimed beliefs are held sincerely just as they determine other questions of fact. *See* United States v. Seeger, 380 U.S. 163, 185 (1965) (the sincerity of an individual's belief is a question of fact in determining a claim for military service exemption by a conscientious objector).

128. *Thomas,* 450 U.S. at 716. *But see* Walker v. Superior Court, 47 Cal. 3d 112, 139, 763 P.2d 852, 870, 253 Cal. Rptr. 1, 19 (1988), *cert. denied,* 491 U.S. 905 (1989) (noting that "resort to medicine does not constitute 'sin' for a Christian Scientist . . . , does not result in etribution . . . , and . . . is not a matter of church compulsion").

129. *See supra,* Part I.A.(1).

130. 322 U.S. 78 (1944).

131. *Id.* at 88.

lieve what they cannot prove. . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations."[132] An absolute freedom to believe what one chooses necessarily must preclude others from demanding justifications for those protected thoughts.

Adding the proscription against inquiries into the correctness of beliefs, the Supreme Court's free exercise cases provide the following analytical scheme: (1) Only sincere, *religious* beliefs and practices are shielded from state interference; (2) *beliefs* are completely beyond the reach of state regulation; (3) *actions* motivated by those beliefs may be burdened by state intrusion, provided the intrusion is merely incidental to an otherwise valid state action; but (4) courts *may not* evaluate an individual's professed belief beyond questioning whether the belief is sincerely held.

The Supreme Court's fundamental belief-conduct dichotomy is central to judicial evaluations of religiously motivated treatment for ill children. A parent's belief in the healing power of prayer is easily distinguished from conduct motivated by that belief that impacts on a child—withholding orthodox medical treatment, for instance.[133] But though this distinction strikes an intuitive balance between the individual's right to believe and the protection of third parties from the effects of that individual freedom, its application ultimately has proven disastrous for nontraditional and unpopular religious beliefs like faith healing.

II. Religiously Motivated Treatment Decisions for Children

While under *Employment Division v. Smith,*[134] states may no longer need to show a compelling interest to restrict religiously motivated conduct outside the area of unemployment compensation,[135] the *Smith* opinion implies that a "hybrid" claim involving free exercise rights in conjunction with parental rights would continue to merit at least some level of heightened protection.[136] Presumably, then, a par-

132. *Id.* at 86-87.

133. *See infra* text accompanying notes 153-163.

134. 110 S. Ct. 1595 (1990).

135. *See supra* text accompanying notes 76-78, 82.

136. *See Smith,* 110 S. Ct. at 1601-02 (leaving open the possibility that a state would be required to show a greater interest in the face of free exercise claims in conjunction with the rights of parents); Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (recognizing the strengthened first amendment claim when interests of parenthood combine with free exercise rights); Pierce v. Society of Sisters, 268 U.S. 510, 518-21 (1925) (allowing parents to send their children

ent wishing to treat her ill child with prayer would fall into this protected area, and the state's restriction of that religious conduct would be valid only upon a showing of some heightened level of state interest.

When courts have faced issues regarding the health and well-being of children in the past, states generally have been able to meet even a compelling interest standard to justify limiting free exercise rights.[137] In *Prince v. Massachusetts,*[138] although placing "the custody, care and nurture" of children with the parents,[139] the United States Supreme Court held that both religious and parental rights have limitations and the state may invoke its power as *parens patriae* to place restrictions on a parent's control over her child's activities.[140] Moreover, this rationale is entirely consistent with the Court's belief-conduct distinction in the area of free exercise. A parent is free to believe as she wishes, but when her actions affect her child, the state may infringe upon the parent's first amendment rights in the interest of protecting the child's well-being.[141] In this "no man's land" of competing rights and interests,[142] the parent's provision of prayer and spiritual treatment to her child, in lieu of orthodox medical treatment, approaches the boundaries of protected first amendment free exercise.

Nonetheless, in allowing Laurie Walker's prosecution for criminal negligence, the court in *Walker v. Superior Court*[143] allowed the state to restrict not only an individual's religiously motivated conduct, but also her thoughts, convictions, and beliefs. The California Supreme Court's decision in *Walker* illustrates the complexity of cases involving religiously motivated treatment decisions for children. Under a *Sherbert* analysis,[144] balancing parental free exercise rights against a strong

to private schools: "it is not debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent."); *supra* text accompanying notes 79-82.

137. *See* Note, *Faith Healing Exemptions, supra* note 3, at 252.

138. 321 U.S. 158 (1944).

139. *Id.* at 166.

140. *Id. Parens patriae* "refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); *see also* Note, *Relief for the Neglected Child: Court-Ordered Medical Treatment in Non-Emergency Situations,* 22 SANTA CLARA L. REV. 471, 472 (1982) (authored by Brian Hawes) ("The state, as *parens patriae,* is the ultimate protector of the rights of its citizen children."); 43 C.J.S. *Infants* § 5 (1978) ("A minor, deprived of parental care and control, is a ward of the state, over whom the state may exercise its sovereign power of guardianship . . . .").

141. *Prince,* 321 U.S. at 166-67; *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (actions prompted by religious beliefs subject to legislative restriction upon showing of "compelling state interest").

142. *Prince,* 321 U.S. at 165.

143. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied,* 491 U.S. 905 (1989).

144. The *Walker* majority cited Wisconsin v. Yoder, 406 U.S. 205 (1972), and Thomas v.

state interest in the protection of children, the *Walker* court found that the state interest in protecting children far outweighed the parental right to protection of religious conduct.[145]

A. Background on Faith Healing Prosecutions

States consistently have been willing to prosecute parents who provide spiritual treatment for their children in lieu of traditional medical care when the parents' methods have been ineffective and resulted in death.[146] The courts generally take the position that "an enlightened society will not permit the great healing medium of modern medicine and surgery to be denied to children, regardless of the conscientious belief of their parents . . . ."[147] One commentator, however, has noted the number of convictions of faith healing parents that have been overturned on technical grounds unrelated to the underlying charge of manslaughter or neglect and has questioned whether this pattern reflects "an unstated judicial policy of sympathy."[148] Nonetheless, as early as 1903 in *People v. Pierson,*[149] a parent's conviction was affirmed after his infant child died of pneumonia when he relied on "Divine healing" rather than seek medical care for her.[150] Since then, other courts similarly have rejected religious defenses of parents who refuse medical treatment for their gravely ill children.[151]

In addition to holding parents criminally liable, courts have taken legal custody of ill children whose parents refuse to consent to medical treatment for them based on religious objections.[152] In *State v. Per-*

Review Bd., 450 U.S. 707 (1981), in applying what was in fact a *Sherbert* compelling interest-least restrictive means analysis. *Walker,* 47 Cal. 3d at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18.

145. *Walker,* 47 Cal. 3d at 139, 763 P.2d at 869-70, 253 Cal. Rptr. at 18-19.

146. Ingram, *State Interference with Religiously Motivated Decisions on Medical Treatment,* 93 DICK. L. REV. 41, 59 (1988). For a discussion of early approaches to the regulation of prayer healing in England and the United States, see Note, *California's Prayer Healing, supra* note 4, at 397-400.

147. Ingram, *supra* note 146, at 59-60 (quoting Eggleston v. Landrum, 210 Miss. 645, 653, 50 So. 2d 364, 367 (1951)).

148. Note, *Religious Beliefs, supra* note 3, at 8; *see also* Note, *Parental Failure, supra* note 13, at 874-76.

149. 176 N.Y. 201, 68 N.E. 243 (1903).

150. *Id.* at 204, 68 N.E. at 244.

151. *See, e.g.,* Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied,* 109 S. Ct. 3186 (1989); People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); Owens v. State, 6 Okla. Crim. 110, 116 P. 345 (1911); Commonwealth v. Barnhart, 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied,* 488 U.S. 817 (1985).

152. Note, *Faith Healing Exemptions, supra* note 3, at 254-57.

ricone,[153] the New Jersey Supreme Court upheld the appointment of a guardian for the infant son of Jehovah's Witnesses when the parents refused to grant permission for a blood transfusion.[154] The court noted a New Jersey statute exempting the parents from criminal liability for withholding medical treatment on religious grounds, but held, "[I]t does not follow that because such persons are immune from criminal prosecutions, the State is helpless in protecting children."[155]

Despite judicial willingness to use both civil and criminal devices to protect children, states have begun to recognize faith healing statutorily. Almost all states currently have some form of spiritual healing exemption in statutes that require parents to provide necessary medical care for their children.[156] The courts' application of these exemptions illustrates the ultimate conflict between the parents' free exercise rights and the state's interest in protecting children. Courts must determine whether the exemptions will immunize parents from criminal liability absolutely or will provide only limited defenses. The California Supreme Court faced this issue in *Walker v. Superior Court.*[157]

B. Statutory Exemption for Spiritual Treatment

Section 270 of the California Penal Code provides that a parent's failure to provide certain necessities of life to her child constitutes a misdemeanor.[158] In *Walker,* the California Supreme Court held that because of an explicit exemption in that statute, spiritual treatment in lieu of orthodox medical treatment does not subject parents to criminal liability under section 270.[159] Nonetheless, it found no basis for extending the exemption to the two felonies for which Laurie Walker was charged—felony child endangerment and involuntary manslaughter.[160] The court relied in part on the absence of any shared objectives between section 270 and the two felonies. Laurie Walker contended that section 270 was not a fiscal support provision, but that its purpose was "to protect children from serious injury."[161] Because the manslaughter and child endangerment statutes of sections 192(b) and 273a

153. 37 N.J. 463, 181 A.2d 751, *cert. denied,* 371 U.S. 890 (1962).

154. *Id.* at 480, 181 A.2d at 760.

155. *Id.* at 478, 181 A.2d at 759.

156. *See* Clark, *Religious Accomodation and Criminal Liability,* 17 FLA. ST. U. L. REV. 559, 560 n.5 (1990) (collecting statutes).

157. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied,* 491 U.S. 905 (1989).

158. CAL. PENAL CODE § 270 (West 1988). For the text of § 270, see *supra* note 9.

159. *Walker,* 47 Cal. 3d at 122-23, 763 P.2d at 856-58, 253 Cal. Rptr. at 6-7.

160. *Id.* at 129, 763 P.2d at 862, 253 Cal. Rptr. at 11-12.

161. *Id.* at 125, 763 P.2d at 859, 253 Cal. Rptr. at 125.

shared this statutory purpose, Walker contended that the legality of her conduct under section 270 necessarily created an exemption from prosecution for those crimes as well.[162] The majority in *Walker,* however, held that the principal objectives of section 270 were to provide support for children and "to protect the public from the burden of supporting a child who has a parent able to support him."[163] By thus limiting the purpose of section 270, the court was able to avoid application of the section 270 exemption to Walker's felony prosecutions.[164] Strangely, the majority found no inconsistency in its conclusion that Walker might be protected from criminal liability for the misdemeanor, but not for the two felonies for which she was being prosecuted. A parent's treatment of her child with prayer is lawful, as is treatment with orthodox medicine. The faith healing parent, however, must always be successful in curing her child or risk criminal prosecution.

The *Walker* court examined the legislative history of the amendments creating the section 270 exemption and determined that although the legislature was aware that a possibility of prosecutions for involuntary manslaughter and child endangerment remained, it had chosen not to address that situation.[165] The court placed great weight on the legislature's silence, particularly in light of staff reports that brought the matter to the attention of the legislators.[166] The court concluded that "considered silence is an insufficient basis to infer that the Legislature, by amending a misdemeanor support provision, actually exempted from felony liability all parents who offer prayer alone to a dying child."[167]

The court also rejected Laurie Walker's contention that application of the section 270 exemption to sections 273a and 192(b) follows from a general statutory recognition of faith healing in California.[168]

162. *Id.* at 123-24, 763 P.2d at 858-59, 253 Cal. Rptr. at 7-8. When statutes relate to the same subject or to the same class of persons, or share the same purpose, they are said to stand in *pari materia* and one should be interpreted in light of the other. *Id.* at 124 n.4, 763 P.2d at 859 n.4, 253 Cal. Rptr. at 8 n.4.

163. *Id.* at 124, 763 P.2d at 859, 253 Cal. Rptr. at 8 (quoting People v. Sorensen, 68 Cal. 2d 280, 287, 437 P.2d 495, 500, 66 Cal. Rptr. 7, 12 (1968)). *Contra* Note, *California Penal Code's Child Neglect/Abandonment Statutes: Religious Freedom or Religious Persecution?,* 25 SANTA CLARA L. REV. 613, 617-21 (1985) (authored by Jenny Brown) [hereinafter Note, *Child Neglect/Abandonment Statutes*] (concluding that § 273a, the felony child endangerment statute, should be read to include the § 270 exemption).

164. *Walker,* 47 Cal. 3d at 126, 763 P.2d at 860, 253 Cal. Rptr. at 9.

165. *Id.* at 128, 763 P.2d at 862, 253 Cal. Rptr. at 11.

166. *Id.* at 128-29, 763 P.2d at 862, 253 Cal. Rptr. at 11.

167. *Id.* at 129, 763 P.2d at 862, 253 Cal. Rptr. at 11.

168. *Id.* at 129-30, 763 P.2d at 862, 253 Cal. Rptr. at 12. Laurie Walker cited provisions

The court found support for its contrary position in section 300 of the California Welfare and Institutions Code,[169] which allows the juvenile court to take custody of a child whose health is endangered. Section 300 defers to a parent's decision to provide treatment through prayer; but in circumstances in which judicial intervention is "necessary to protect the minor from suffering serious physical harm or illness," the parents' interests must yield to the state's overriding interest in the child's health.[170] The courts then will assume jurisdiction over treatment decisions. The *Walker* court found in this section a clear expression of legislative intent: "when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield."[171]

The state clearly can limit the parent's right to engage in conduct injurious to the child's health consistent with the first amendment.[172] But the fact that the state may limit a parent's religiously motivated *conduct* to protect the health of children in no way implies that the state may interfere with that parent's religious *beliefs* in a prosecution

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of the Health and Safety Code exempting prayer practitioners and institutions from state licensing requirements as well as Welfare and Institutions Code sections that accommodate persons who choose to rely on prayer treatment. *Id.* at 129 n.9, 130 n.10, 763 P.2d at 863 nn.9-10, 253 Cal. Rptr. at 12 nn.9-10. The court found that these provisions did not represent a statutory validation of prayer treatment for children. It rejected the contention that the overall statutory scheme in California represents an endorsement of the reasonableness of prayer treatment, holding instead that it merely shows "a willingness to accommodate religious practice when children do not face serious physical harm." *Id.* at 138, 763 P.2d at 868, 253 Cal. Rptr. at 17-18.

169. CAL. WELF. & INST. CODE § 300 (West Supp. 1991). The statute provides in relevant part:

> Any minor who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:
>
> . . . .
>
> (b) The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of . . . willful or negligent failure of the parent or guardian to provide the minor with adequate food, clothing, shelter, or medical treatment . . . . Whenever it is alleged that a minor comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by an accredited practitioner thereof, and shall not assume jurisdiction unless necessary to protect the minor from suffering serious physical harm or illness.

Id.

170. *Id.*

171. *Walker*, 47 Cal. 3d at 133, 763 P.2d at 866, 253 Cal. Rptr. at 15.

172. *See* Wisconsin v. Yoder, 406 U.S. 205, 229-30 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

under a theory of criminal negligence. Because section 270 makes the spiritual treatment of children lawful conduct,[173] a prosecution for child endangerment and involuntary manslaughter in these circumstances rests on a theory of criminal negligence.[174] By definition criminal negligence requires an examination into the reasonableness of the defendant's knowledge and beliefs, if only to conclude that they were unreasonable.[175]

C. The Objective Standard of Criminal Negligence

Without extending the section 270 exemption, the *Walker* court still could have protected Laurie Walker's free exercise rights by recognizing the conflict between its objective standard for criminal negligence and her absolute right to remain free from governmental intrusion in the area of her religious beliefs.[176] Laurie Walker contended that no reasonable jury could find her conduct criminally negligent. The court's dismissal of this assertion by the conclusory statement that "criminal negligence must be evaluated objectively"[177] illustrates the risk of defending a religious belief against an objective examination. The truth is that the defendant was wrong; a "reasonable" jury might well find her conduct criminally negligent if allowed to judge that conduct by an objective standard of reasonableness. This necessarily requires an examination of the reasonableness of her belief that spiritual treatment would cure her child. By ignoring the nature of the burden imposed on Walker's religious *belief* by such an examination, the court was able to avoid consideration of her subjective religious beliefs in its judgment of her conduct.

Thus, it is not surprising that the *Walker* court found Laurie Walker's conduct sufficiently culpable to sustain a conviction for either felony child endangerment or involuntary manslaughter.[178] The court relied on a rudimentary survey of criminal negligence cases in California. For a definition of criminal negligence, the court looked to *People v. Penny*.[179] In *Penny,* the defendant operated a "face rejuvenation" clinic and was convicted under section 192 of the California Penal Code[180] for involuntary manslaughter based upon the

173. *See supra* note 159 and accompanying text.
174. *See Walker,* 47 Cal. 3d at 128, 763 P.2d at 861, 253 Cal. Rptr. at 10.
175. *See id.* at 135, 763 P.2d at 866-67, 253 Cal. Rptr. at 15-16.
176. *See supra* notes 16-19 and accompanying text.
177. *Walker,* 47 Cal. 3d at 136, 763 P.2d at 868, 253 Cal. Rptr. at 17.
178. *Id.* at 137-38, 763 P.2d at 868-69, 253 Cal. Rptr. at 17-18.
179. 44 Cal. 2d 861, 285 P.2d 926 (1955).
180. For the relevant text of § 192, see *supra* note 6.

accidental poisoning and death of a customer.[181] The *Penny* court reversed the defendant's conviction because it was based on criminal negligence and, thus, the jury instruction on ordinary civil negligence was erroneous.[182] The *Walker* court adopted that distinction and described the sort of conduct required to constitute criminal negligence:

> aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or . . . a disregard of human life or an indifference to consequences.[183]

Furthermore, the court continued, criminal negligence is evaluated "pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life."[184]

Similarly, the *Walker* court cited *People v. Peabody,*[185] which held that the standard of conduct condemned by section 273a(1), the felony child endangerment statute, amounted to criminal negligence.[186] In *Peabody,* the trial court held that if the defendant willfully caused or permitted her baby to be placed in a dangerous situation, then a conviction under section 273a(1) could stand.[187] The California Supreme Court reversed the defendant's conviction because the trial court failed to instruct the jury on the proper criminal negligence standard, citing the objective standard set out in *Penny.*[188]

The *Walker* court found further support for using an objective standard for criminal negligence in *People v. Burroughs.*[189] In *Burroughs;* the court held that the defendant could be prosecuted for criminally negligent involuntary manslaughter without any showing of intent to harm.[190] Similarly, the *Walker* court did not imply that Laurie Walker harbored any evil motives in the treatment of her daughter. In fact, the court recognized that the "[d]efendant unquestionably relied on prayer treatment as an article of genuine faith, the restriction of which

181. *Penny,* 44 Cal. 2d at 863-65, 285 P.2d at 928.

182. *Id.* at 880, 285 P.2d at 937.

183. Walker v. Superior Court, 47 Cal. 3d 112, 135, 763 P.2d 852, 866, 253 Cal. Rptr. 1, 15-16 (1988), *cert. denied,* 491 U.S. 905 (1989) (citing *Penny,* 44 Cal. 2d at 879, 285 P.2d at 937).

184. *Id.,* 763 P.2d at 867, 253 Cal. Rptr. at 16 (citing *Penny,* 44 Cal. 2d at 880, 285 P.2d at 937).

185. 46 Cal. App. 3d 43, 119 Cal. Rptr. 780 (1975).

186. *Id.* at 45, 119 Cal. Rptr. at 780.

187. *Id.* at 46, 119 Cal. Rptr. at 781; *see* CAL. PENAL CODE § 273a(1) (West 1988).

188. *Id.* at 48, 119 Cal. Rptr. at 783.

189. 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984).

190. *Burroughs,* 35 Cal. 3d at 834, 678 P.2d at 901, 201 Cal. Rptr. at 326.

would seriously impinge on the practice of her religion."[191] By ignoring Laurie Walker's intent, however, the court was able to compare her situation to other criminal negligence cases in which the defendants had not made free exercise claims.[192] It is in these comparisons that the danger of the court's analysis becomes apparent.[193]

The *Walker* court also relied on *People v. Atkins,*[194] which involved a mother's conviction for involuntary manslaughter and felony child endangerment after her child died from lack of medical care. The *Atkins* court held that the mother's "failure to seek prompt medical attention for [her son], rather than waiting several days," was sufficient to support a finding of criminal negligence and thus supported a conviction for involuntary manslaughter.[195] In reaching this conclusion the *Atkins* court relied on evidence showing that the mother "knew or should have known" the extent of her son's injuries.[196]

Under this objective standard a parent is charged with the knowledge of a reasonably prudent person that her child requires medical attention; failure to secure treatment in such circumstances constitutes criminal negligence. The *Walker* court's reliance on *Atkins* is misplaced, however, because in *Atkins,* the child victim was the object of repeated physical abuse. Moreover, in addition to the manslaughter and child endangerment convictions, there were convictions against the mother for battery and against the mother's male companion (a co-defendant) for second degree murder and infliction of corporal punishment.[197] Reviewing the trial court's convictions, the court of appeal in *Atkins* was not certain on what ground the jury had based the mother's involuntary manslaughter conviction: inflicting the actual injuries, allowing the child to be injured by the boyfriend, or failing to seek medical attention after the injuries occurred.[198] The court of appeal simply noted that the jury found sufficient evidence to support the conviction, *if only* in the mother's failure to take her son to a doctor.[199]

That the *Walker* majority found *Atkins* analogous to Laurie Walker's case illustrates the precariousness of the first amendment free exercise guarantees if courts apply an objective negligence standard

191. Walker v. Superior Court, 47 Cal. 3d 112, 139, 763 P.2d 852, 869-70, 253 Cal. Rptr. 1, 19 (1988), *cert. denied,* 491 U.S. 905 (1989).

192. *Id.* at 134-38, 763 P.2d at 866-69, 253 Cal. Rptr. at 15-18.

193. *See infra* notes 200-206 and accompanying text.

194. 53 Cal. App. 3d 348, 125 Cal. Rptr. 855 (1975).

195. *Id.* at 360, 125 Cal. Rptr. at 855.

196. *Id.*

197. *Id.* at 352-53, 125 Cal. Rptr. at 855.

198. *Id.* at 360, 125 Cal. Rptr. at 862-63.

199. *Id.*

to cases involving religiously motivated conduct. Comparing *Atkins,* the *Walker* court stated, "When divorced of her subjective intent, the alleged conduct of defendant here is essentially indistinguishable."[200] This statement begs the question. It is Walker's subjective intent, or rather her constitutionally protected religious belief in the power of prayer as a healer, that distinguishes the prosecution of the mother in *Atkins* from that of Laurie Walker. The *Walker* court's logic is somewhat like comparing a murder prosecution following an unprovoked drive-by shooting, with a murder prosecution following an attempted rape in which the assailant was shot in the struggle with his victim. In the first scenario, the defendant has no recognized defense under the law. But in the second scenario, the victim can claim self-defense and avoid conviction. Walker's constitutionally mandated freedom from government restriction of her religious beliefs is at least as strong a defense as that of the assault victim.

In light of the physical abuse in *Atkins,* the mother's failure to seek any treatment for her child was at least criminally negligent; she made no attempt to heal her son by orthodox medical treatment *or* prayer. In other words, she had no legally recognized objection to being judged by an objective standard. But Laurie Walker sincerely believed that she was doing everything in her power to help her daughter, a belief grounded in her constitutionally protected religious faith.

In support of her claim that no reasonable jury could find her conduct criminally negligent, Laurie Walker cited *People v. Rodriguez,*[201] in which the California Supreme Court reversed a mother's involuntary manslaughter conviction after the court found that the actions of the mother in leaving her children alone were not sufficiently reckless to amount to criminal negligence.[202] Continuing to judge Walker's conduct without regard for her religious beliefs, the *Walker* court distinguished *Rodriguez,* finding that "the failure of defendant [Walker] to seek medical attention for a child who sickened and died over a 17-day period . . . [was] plainly more egregious than the decision of Mrs. Rodriguez to leave her children alone at home for an afternoon."[203]

But in *Rodriguez,* the defendant's two-year-old died in a fire that broke out while her children were at home alone and the defendant was in a bar.[204] Even more disturbing, the defendant in *Rodriguez* had

200. Walker v. Superior Court, 47 Cal. 3d 112, 137, 763 P.2d 852, 868, 253 Cal. Rptr. 1, 17 (1988), *cert. denied,* 491 U.S. 905 (1989).

201. 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (1960).

202. *Id.* at 440-41, 8 Cal. Rptr. at 868-69.

203. *Walker,* 47 Cal. 3d at 138, 763 P.2d at 869, 253 Cal. Rptr. at 18.

204. *Rodriguez,* 186 Cal. App. 2d at 435-36, 8 Cal. Rptr. at 865.

left the house before 4:00 p.m. and was still away when the fire killed her son some time after 10:00 p.m.[205] That the *Walker* court found Laurie Walker more culpable than the mother in *Rodriguez* illustrates why unpopular religious beliefs must be protected. Because the California Supreme Court found Laurie Walker's belief that prayer and spiritual treatment would heal her daughter objectively unreasonable,[206] it found no reason to block her prosecution. If the court had recognized that such a prosecution necessarily would violate an area for which the free exercise clause gives absolute protection, her religious *belief,* then the question of objective reasonableness never would have been reached.

Thus, having decided that the section 270 exemption for spiritual treatment would not apply to felony child endangerment and involuntary manslaughter,[207] the California Supreme Court treated Walker's prosecution just as it would any other manslaughter or child endangerment case. The court outlined clear precedent establishing that criminal negligence is determined by an objective standard.[208] For the majority, the only remaining question would rest with the jury: Was Walker's failure to seek medical care for her daughter during seventeen days of illness such a departure from the conduct of a reasonably prudent person in those circumstances as to be incompatible with a proper regard for human life?[209] Application of this objective standard, however, raises several constitutional concerns in the area of faith healing.

III. The Incompatibility of an Objective Standard with Free Exercise

By divorcing the question of Laurie Walker's subjective intent from its discussion of her first amendment free exercise rights—thereby ignoring her *belief* in the power of prayer as a healer—the *Walker* court avoided addressing the violation of those rights.[210] An objective standard allows the trier of fact to judge the defendant either by effectively denying the protected religious beliefs that motivated the conduct or by determining the reasonableness of those beliefs. The *Walker*

205. *Id.*

206. *Walker,* 47 Cal. 3d at 138, 763 P.2d at 869, 253 Cal. Rptr. at 18.

207. *See supra* notes 160-171 and accompanying text.

208. *Walker,* 47 Cal. 3d at 136-37, 763 P.2d at 868, 253 Cal. Rptr. at 17.

209. *See id.* at 138, 763 P.2d at 868-69, 253 Cal. Rptr. at 21.

210. *See supra* Part II.C.; *cf.* Clark, *supra* note 156, at 577-79 (discussing constitutional limitations on jury determinations in spiritual healing prosecutions—inquiries into the reasonableness of a religious belief not permitted).

court opened its discussion of the defendant's constitutional claims by acknowledging that although the first amendment "absolutely protects religious belief, religiously motivated conduct 'remains subject to regulation for the protection of society.'"[211] In essence, by mischaracterizing the intrusion of a criminal negligence prosecution as only burdening religious *conduct*, the *Walker* court was able to define Laurie Walker's *belief* out of existence. Walker's spiritual treatment of Shauntay was clearly conduct motivated by her beliefs, and the court easily found that the state could restrict that conduct through criminal prosecution. On its face, the California court's decision appears consistent with the United States Supreme Court's application of the belief-conduct distinction.

Quoting from *Prince v. Massachusetts,*[212] the *Walker* court stated its basis for rejecting Laurie Walker's free exercise claims: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves."[213] The court characterized the issue narrowly: the state is regulating the *actions* of the defendant in an area of compelling interest, that of securing the welfare of innocent children. It acknowledged the sincere nature of the defendant's religious beliefs and the significant infringement that its decision represents, but found that the "[i]mposition of felony liability for endangering or killing an ill child by failing to provide medical care furthers an interest of unparalleled significance: the protection of the very lives of California's children."[214]

The *Walker* court's application of *Prince* is misplaced. *Prince* undeniably acknowledged the power of the state to limit parental authority "in things affecting the child's welfare."[215] Relying on *Reynolds v. United States,*[216] the *Prince* court held that the state's authority to regulate the conduct of children is not overriden merely because the parent claims a religious right to control her child's conduct.[217] But *Prince* merely demonstrated the compelling interest of the state in protecting children: "The state's authority over children's activities is

211. *Walker,* 47 Cal. 3d at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

212. 321 U.S. 158 (1944).

213. *Walker,* 47 Cal. 3d at 139, 763 P.2d at 870, 253 Cal. Rptr. at 19 (citing *Prince,* 321 U.S. at 170).

214. *Id.* at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18.

215. *Prince,* 321 U.S. at 167.

216. 98 U.S. 145 (1978).

217. *Prince,* 321 U.S. at 166.

broader than over like actions of adults."[218] The defendant in *Prince* was convicted of violating a state child labor law when she allowed her nine-year-old niece to distribute *Watchtower* magazines.[219] That state law did not involve an intrusion into the defendant's *beliefs*; she was not charged with any knowledge of the reasonableness of her conduct.[220] Thus, although *Prince* allowed restrictions on the defendant's religious *practices* in the face of a compelling state interest to protect children, it does not follow that this same interest would justify the intrusion into *beliefs* represented by the application of an objective criminal negligence standard in *Walker*.

A. Balancing Competing Interests

In light of the state's compelling interest in protecting the health and welfare of children, a result that completely protects a parent's free exercise rights at the child's expense is unacceptable. Nonetheless, decimating free exercise rights in the interest of protecting children is no less unacceptable. As the court pointed out in *Walker*, there are two alternative approaches to protect children whose parents withhold orthodox medical treatment on religious grounds. The state can institute civil dependency proceedings to assume control over treatment decisions, or when the state is not aware of the danger to a child until she has suffered serious harm or death, it can impose criminal liability on the parent.[221]

Finding that the imposition of criminal liability was the least restrictive means available to protect children, the *Walker* court expressed its opinion that civil dependency proceedings are far more intrusive on parental interests than the application of criminal laws.[222] Although the defendant and the Christian Science Church argued to the contrary, the court concluded, "it is not clear that parents would prefer to lose custody of their children pursuant to a disruptive and invasive judicial inquiry than to face privately the prospect of criminal liability."[223] Such a subjective inquiry into parents' preferences may have no adequate resolution, but constitutional standards exist by which the alternative intrusions must be measured. Each intrusion must be

218. *Id.* at 168.

219. *Id.* at 159-63.

220. *See id.* at 162-63.

221. *See* Walker v. Superior Court, 47 Cal. 3d 112, 133-34, 763 P.2d 852, 865-66, 253 Cal. Rptr. 1, 14-15 (1988), *cert. denied,* 491 U.S. 905 (1989); *accord* Ingram, *supra* note 146, at 57; Note, *Parental Failure, supra* note 13, at 885.

222. *Walker,* 47 Cal. 3d at 134, 763 P.2d at 866, 253 Cal. Rptr. at 15.

223. *Id.* at 140, 763 P.2d at 870, 253 Cal. Rptr. at 19-20.

examined in the context of the free exercise rights of the parent. Again, the *Walker* court was asking the wrong question. Because a prosecution based upon an objective standard of criminal negligence violates the absolute protection of the defendant's religious beliefs, the extent of the restriction on her belief is immaterial.

If a court intervenes and orders medical treatment for a child, the parent's free exercise rights have been infringed to the extent that the state has interrupted her religiously motivated conduct.[224] While potentially interfering with a parent's free exercise rights, such actions by the state are directed at the parent's religiously motivated conduct in pursuit of what is clearly a compelling state interest.[225] This is clearly acceptable under the established belief-conduct distinction of the United States Supreme Court's free exercise decisions.[226]

If the state imposes criminal liability based on an objective criminal negligence standard in the event that a child suffers serious illness or death, however, then the state is not simply interfering with the religious conduct of the parent; the state effectively is taking the parent's *belief* from her. The state has said to that parent, "You may not believe because what you put faith in is unreasonable." This intrusion represents an unmatched attack on the most initmate of all individual preserves: one's thoughts and convictions regarding life and death, creation and infinity.

The line that the Supreme Court rhetorically has drawn between an individual's personal convictions and her outward expression of those beliefs through her conduct is crucial. In *Reynolds v. United States,*[227] the Supreme Court posed the obvious question for this inherent conflict: "Suppose one believed that human sacrifices were a necessary part of religious worship . . . ?"[228] The *Reynolds* Court recognized that a line had to be drawn, and the Court since has held

224. One commentator contends that any theoretical distinction between imposing criminal sanctions and ordering medical treatment is without practical significance. *See* Ingram, *supra* note 146, at 60. The result is the same in either case: "the parents' right to freely exercise their religion, including the right to determine the religious beliefs and practices of their children, is violated by state intervention." *Id.*; *see also id.* at 61-64 (state-mandated medical treatment over parents' religious objections involves the state deciding that physical life on earth has a higher value than spiritual life thereafter which is a violation of the first amendment); *cf.* Note, *Religious Beliefs, supra* note 3, at 396-98 (questioning whether there is any real distinction between "faith" and "healing").

225. After *Employment Division v. Smith,* the requirement that the state show a compelling interest is subject to serious doubt. *See supra* notes 70-88 and accompanying text. Nonetheless, it is certain that the protection of the health of children would meet any lesser standard following *Smith. See supra* notes 137-142 and accompanying text.

226. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1599 (1990).

227. 98 U.S. 145 (1878).

228. *Id.* at 166.

steadfastly to the *Reynolds* belief-conduct framework. An individual's religious *belief* in the necessity of human sacrifice is absolutely protected under the free exercise clause of the constitution; however, her conduct motivated by that belief—the act of human sacrifice—may be restricted by the state. As one court has noted, "presumably, no court would hesitate to enjoin the sacrifice of a child to a volcano god."[229] But significantly, if the state law provides that the actual conduct of physically throwing another person into a volcano is legal, and then in a later prosecution for criminal negligence claims that a reasonable person would have known that a volcano would cause death, the absolute constitutional protection of religious belief would be violated. Because the conduct was legal, the criminal law is left only to judge the knowledge and beliefs of the defendant in choosing that conduct.

Thus, while the state undoubtedly has a right to take actions to protect the health and welfare of children, if we are to preserve the area of religious *belief* from state intrusion, the methods with which the state chooses to protect children cannot be unchallengeable. Because the conduct of a parent who chooses to treat her child with prayer only becomes "criminal" at the point when a reasonable person would have sought orthodox medical treatment,[230] any judgment of her culpability necessarily compares her belief in prayer as a healer against what a "reasonable person" would have believed. And if the trier of fact determines that the parent's religious belief was unreasonable, she will be convicted. The focus of such an inquiry is not on the parent's conduct; rather, the focus is on whether a reasonable person would have believed her conduct to be the proper course. If a reasonable person would have believed in the power of prayer as a healer, then the parent's decision not to seek medical care cannot be unreasonable.[231] It is inescapable, then, that a criminal negligence prosecution in these circumstances, based on a theory of objective reasonableness,

229. *In re* Jensen, 54 Or. App. 1, 7, 633 P.2d 1302, 1306 (1981).

230. *See* Walker v. Superior Court, 47 Cal. 3d 112, 135-38, 763 P.2d 852, 866-69, 253 Cal. Rptr. 1, 15-18 (1988); *see also id.* at 142, 763 P.2d at 872, 253 Cal. Rptr. at 21 (holding due process guarantee of notice satisfied in that "'[t]he matter of degree' that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent").

231. This discussion is not meant to imply that the parent who chooses to treat her ill child with prayer should be judged by a reasonable "believer in faith healing" standard. Such a standard would frustrate the prohibition against courts inquiring into the truth of a religion or religious belief. *See* Thomas v. Review Bd., 450 U.S. 707, 715 (1981). Instead, it is meant to illustrate the wrongness of the *Walker* court's claim that an objective standard for criminal negligence only judges *conduct*. *See Walker*, 47 Cal. 3d at 137, 138-40, 763 P.2d at 867, 253 Cal. Rptr. at 17.

violates the defendant's free exercise rights because it intrudes into an area of absolute protection—her religious belief.

B. Hazards of a Merely Rhetorical Belief-Conduct Distinction

The Supreme Court consistently has held that religious beliefs are absolutely protected from state intrusion.[232] Individuals are free to think and believe what they wish; free from government compulsion or fear of government sanction: "Government may neither compel affirmation of a repugnant belief . . . nor penalize . . . individuals or groups because they hold religious views abhorrent to the authorities . . . ."[233] Religiously motivated conduct, however, has never received absolute protection.[234] To hold otherwise, the Court has acknowledged, would invite chaos.[235]

Because of its intuitive appeal, the belief-conduct framework has survived over 100 years of constitutional rhetoric. The focus on individual rights in our Constitution places a high premium on personal autonomy: for example, freedom from intrusion into one's home and one's person.[236] Thus, it is not surprising that in the area of free exercise, the Supreme Court has felt compelled to preserve the individual's absolute right of freedom from incursions into her mind. Yet, because the potential for disorder is easy to imagine in a nation in which all conduct in the name of religion is immune from government regulation, the Court's reduced protection for religiously motivated conduct is equally unsurprising.

Nonetheless, although the Court has rhetorically carved out an area of absolute protection for religious belief, ultimately free exercise rights are vulnerable to interference at all levels. Laurie Walker's prosecution for criminal negligence illustrates the danger of a distinction between belief and conduct that does not go beyond rhetoric. By ignoring Walker's subjective belief, the California Supreme Court was able to characterize her prosecution for involuntary manslaughter and felony child endangerment as a valid intrusion into religiously mo-

232. *See, e.g.*, Employment Division v. Smith, 110 S. Ct. 1595, 1599 (1990); Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Sherbert v. Verner, 374 U.S. 398, 402 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1878).

233. *Sherbert*, 374 U.S. at 402 (citations omitted).

234. *Smith*, 110 S. Ct. at 1600; *see also Reynolds*, 98 U.S. at 166 (indicating that the government can interfere with religion to prevent human sacrifices as part of religious ceremonies or to prevent wives from burning themselves upon their husbands' funeral "piles" as exercises of religion).

235. *Smith*, 110 S. Ct. at 1605 (citing *Reynolds*, 98 U.S. at 166-67).

236. *See* U.S. CONST. amend. IV.

tivated conduct. And if the state is still required to show a compelling interest, an unlikely possibility after *Smith,* it is doubtful one could find a more compelling concern than the protection of children.[237]

Professor Tribe denies that there is any real distinction between religious belief and religiously motivated conduct.[238] He may be correct, if only in the application of that distinction, but what he derives from rejecting the constitutional rhetoric is an unacceptable conclusion. To say that the only absolute free exercise protection is the right not to be "brainwashed" by the government[239] is to endorse the results of *Walker.* The scope of free exercise protection afforded religious *beliefs* would be narrowed to the point of insignificance. The dutiful rhetoric of an absolutely protected religious belief would have no meaning, and the Court's belief-conduct distinction would be made impotent. The coercion standard of *Lyng v. Northwest Indian Cemetery Protection Association*[240] would become the individual's only protection from state intrusion into her religious practices *and* beliefs. Because the state did not force Laurie Walker to modify her religious beliefs, but rather merely refused to exempt her conduct from a neutral criminal law, its intrusion would be constitutional.

By applying an objective standard of reasonableness to the religiously motivated conduct of parents with a sincere belief in faith healing, however, the courts interfere with belief directly. The conduct is over. By definition, the question focuses only on the parent's belief: Was it objectively reasonable to believe prayer would heal her child? Only if the trier of fact concludes that it was reasonable to believe in prayer's power to heal, could the parent meet this objective standard. As the California Supreme Court betrayed its predisposition toward orthodoxy,[241] so we can expect other "reasonable" persons to react similarly to unfamiliar and nontraditional religious beliefs.

The California Supreme Court's treatment of Laurie Walker's claims illustrates the importance of maintaining the vitality of the pro-

237. Justice Scalia proffered what Justice O'Connor termed a "parade of horribles," *Smith,* 110 S. Ct. at 1612-13 (O'Connor, J., concurring), that would attend the Court's indulgence in "the luxury of deeming *presumptively invalid,* as applied to religious objectors, every regulation of conduct that does not protect an interest of the highest order." *Id.* at 1605. Perhaps significantly, he included in that list "constitutionally required religious exemptions from . . . health and safety regulation such as manslaughter and child neglect laws." *Id.* (citations omitted).

238. L. TRIBE, *supra* note 18, at 1184.

239. *Id.*

240. 485 U.S. 439 (1988); *see supra* text accompanying notes 63-69.

241. Although noting that this question was "in the exclusive province of the jury," the *Walker* court could not help but comment on the "egregious" nature and "objective unreasonableness" of Walker's conduct. Walker v. Superior Court, 47 Cal. 3d 112, 138, 763 P.2d 852, 869, 253 Cal. Rptr. 1, 18 (1988), *cert. denied,* 491 U.S. 905 (1989).

hibition against judicial inquiries that go beyond determining the sincerity of an individual's religious belief. To be deserving of first amendment protection, those beliefs need not be logical or even comprehensible to others. In *Walker*, the court demonstrates that to hold otherwise protects only accepted, traditional religious beliefs—those least in need of the first amendment.

Conclusion

This Note does not argue that the California Supreme Court was wrong in refusing to extend the section 270 exemption to spiritual treatment prosecutions for involuntary manslaughter and felony child endangerment, as a matter of statutory construction. Nonetheless, in upholding a prosecution under a criminal negligence theory, the *Walker* court violated the one area of *absolute* protection under the free exercise clause of the first amendment—religious belief. In the interest of protecting the welfare of children, the state undeniably may restrict the religiously motivated conduct of faith healing parents, but that is not what the court did in *Walker*. The court's decision in *Walker* illustrates the precarious position of unfamiliar and even unpopular religious beliefs in our society. Because the court found Laurie Walker's belief in spiritual treatment objectively unreasonable, it was unwilling to recognize the interference with religious belief inherent in a prosecution for criminal negligence under these circumstances.

The exemption in section 270, recognized by the *Walker* court, "accommodates" the religious practices of parents who choose to treat their ill children with prayer rather than orthodox medicine. But after *Walker,* it is clear that the accommodation for religious conduct in that section does not protect the underlying beliefs motivating that conduct. It is not enough to argue that the "belief" impacts on innocent third parties. The extremely wide opportunity for state restriction on a faith healing parent's *conduct* was addressed by the legislature in section 270 and in statutory provisions allowing state intervention and compelled medical treatment of endangered children. The California Supreme Court's mischaracterization of a prosecution for involuntary manslaughter and felony child endangerment under a criminal negligence theory as restricting only conduct defines absolutely protected religious belief out of existence. The United States Supreme Court's consistent distinction between religious beliefs and religious conduct becomes mere constitutional rhetoric and Professor Tribe's uninspiring theory is proven correct; the only absolute right to religious beliefs—an individual's most intimate inner thoughts and convictions—is the right not to be "brainwashed" by the state.